THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF
THE TTAB

May 2, 1997

Paper No. 25
GDH/gdh

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Jacques Bogart International B.V.
v.
Bogart, Inc.

Opposition No. 89,502 to application Serial No. 74/136,378
filed on February 4, 1991

Neil F. Greenblum and Bonnie G. Klein of Greenblum & Berstein, P.L.C. for Jacques Bogart International B.V.

Edward H. Rosenthal and Evan M. Gsell of Frankfurt, Garbus, Klein & Selz for Bogart, Inc.

Before Cissel, Quinn and Hohein, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Bogart, Inc. has filed an application to register the mark "HUMPHREY BOGART" for "deodorants, perfumes, body soaps, facial soaps, cosmetics, namely, rouge, mascara, eye shadow, eyeliner, face-powder, and make-up base, and hair lotions,

namely, shampoos, hair conditioners, hair wave lotions, hair mousse, hair gel and hair spray".[1]

Jacques Bogart International B.V. has opposed registration on the ground that applicant's mark, when applied to applicant's goods, so resembles the mark "BOGART," which opposer has previously registered for "perfumes, toilet water, toilet soaps, deodorants for personal use, face, skin and body lotions and aftershave lotions,"[2] as to be likely to cause confusion, mistake or deception.

Applicant, other than admitting that it seeks registration of its mark for the goods listed in the opposed application, has denied in its answer the allegations set forth in the notice of opposition.

The record consists solely of the pleadings and the file of the opposed application. Neither party took testimony or introduced any other evidence.[3] Briefs[4] have been filed,[5] but an oral hearing was not requested.

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[1] Ser. No. 74/136,378, filed on February 4, 1991, which alleges a bona fide intention to use the mark in commerce.

[2] Reg. No. 1,423,521, issued on January 6, 1987, which sets forth a date of first use anywhere of September 1975 and a date of first use in commerce of April 1976; combined affidavit §§8 and 15.

[3] We note, in this regard, that opposer has failed to utilize any of the various means for making its pleaded registration properly of record in this proceeding. In particular, as indicated in TBMP §703.02(a), a party pleading ownership of a subsisting federal registration may properly make such registration of record by (i) filing with its notice of opposition two copies of the registration which have been prepared and issued by the Patent & Trademark Office ("PTO") and which show both the current status of and current title to the registration; (ii) filing a notice of reliance, during the party's testimony period for its case-in-chief, on an accompanying copy of the registration which has been prepared and issued by the PTO and which shows both the current status of and current title to

the registration; (iii) introducing a copy of the registration, during the party's testimony period for its case-in-chief, as an exhibit to the testimony of a witness who has knowledge of the current status of and title to the registration and who thus can establish that the registration is still subsisting and is owned by the offering party; or (iv) having the adverse party stipulate to such facts. See Trademark Rules 2.122(d)(1), 2.122(d)(2) and 2.123(b).

[4] Opposer's consented request to file "a complete [initial] brief with a Table of Contents and Table of Authorities" is approved.

[5] Although not made of record at trial, opposer with its initial brief has submitted and refers therein to three exhibits consisting of a plain copy of its pleaded registration, a plain copy of the PTO's acknowledgment of the §§8 and 15 affidavit submitted in connection with the registration, and a copy of the results from a search opposer conducted (after the close of its initial testimony period) utilizing the "Dialog Information Services" database. Opposer, in its initial brief, has also requested that the Board "take judicial notice of the common usage of the words 'Bogie' and 'Bogart' to refer to the late actor Humphrey Bogart." Applicant, in its brief, has essentially objected thereto, correctly observing that "there are no facts of record which prove any grounds for sustaining this opposition" and that opposer "is asking the Board to assume facts not in the record." The assertion by opposer to the contrary in its reply brief is plainly in error for the reasons explained below.

As stated in TBMP §705.02, "[e]xhibits and other evidentiary materials attached to a party's brief on the case can be given no consideration unless they were properly made of record during the time for taking testimony." Consequently, as set forth in TBMP §706.02, the "[f]actual statements made in a party's brief on the case can be given no consideration unless they are supported by evidence properly introduced at trial." Here, as previously pointed out, opposer simply failed to make the evidentiary materials attached to its initial brief of record during the testimony period assigned for presenting its case-in-chief. The arguments in its briefs concerning its mark and goods are thus unsupported.

Moreover, as to opposer's request that the Board take judicial notice, such may properly be done only of a fact which, as provided in Fed. R. Evid. 201(b), is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Since neither category is considered applicable in this case, opposer's request that the Board take judicial notice that the late actor Humphrey Bogart is commonly referred to as "Bogie" and "Bogart" is denied. Fed. R. Evid. 201(c) and 201(d), and TBMP §§712.01, 712.02 and 712.03. In any event, it should be pointed out that even if we were to exercise our discretion and take such notice,

Inasmuch as the issues to be determined in this proceeding, in light of the denials in applicant's answer, are priority and likelihood of confusion, and since opposer, having the burden of proof, has offered no properly admissible evidence to prove its case, it is accordingly adjudged that the opposition must fail.

Decision: The opposition is dismissed.

R. F. Cissel

T. J. Quinn

G. D. Hohein
Administrative Trademark Judges,
Trademark Trial and Appeal Board

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or if opposer had supplied the Board with the necessary source of information from which it would be mandatory that we do so, it would make no difference in the outcome of this opposition because the materials accompanying opposer's initial brief, as explained above, are not properly of record and thus simply cannot be given any evidentiary consideration.